1263

No. 43 #1.

Motion to postpone

Filed Oct. 9, 1899

Office Supreme Court U. S.
FILED
OCT 9 1899
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

CHARLES U. COTTING AND FRANCIS LEE HIGGINSON, *Appellants*,
vs.
A. A. GODARD, AS ATTORNEY-GENERAL OF THE STATE OF KANSAS, AND THE KANSAS CITY STOCK YARDS COMPANY, *et al.*, *Appellees*.
} No. 43.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

MOTION FOR POSTPONEMENT UNTIL A FULL COURT CAN HEAR THE APPEAL.

WILLIAM D. GUTHRIE,
B. P. WAGGENER, AND
ALBERT H. HORTON,
Of Counsel for Appellants.

CRANE & CO., TOPEKA.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

CHARLES U. COTTING AND FRANCIS LEE HIGGINSON, *Appellants*,
vs.
A. A. GODARD, AS ATTORNEY-GENERAL OF THE STATE OF KANSAS, AND THE KANSAS CITY STOCK YARDS COMPANY, *et al.*, *Appellees*.
No. 43.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

MOTION FOR POSTPONEMENT UNTIL A FULL COURT CAN HEAR THE APPEAL.

COME now Charles U. Cotting and Francis Lee Higginson, appellants, by their counsel, and show to the Court that the questions to be presented in this appeal plainly involve a construction of the Federal Constitution, and the determination of rights, privileges and immunities which it is claimed by appellants are protected by its provisions; (Record, 6-7, 28-29, 31, 940-947;) and that as a full Court will not be present at the time this cause has been assigned upon the docket for hearing at this term, on account of the absence of the Chief Justice and

Mr. Justice BREWER, who are abroad as members of the Anglo-Venezuelan Boundary Commission, and as it is confidently expected that the absent Justices will be present at an early day during the term; therefore, appellants move the Court for a postponement of said cause to some later day in the term, when a full Court can hear the case.

Appellants, in support of their motion, call attention that this Court, early in its history, adopted a practice, which has since been adhered to, of requiring constitutional questions to be heard by a full Bench, in order that the judgment in such a case might, if possible, be the decision of a majority of the whole Court.

In *Briscoe v. Commonwealth Bank*, 8 Peters, 118, and *City of New York v. Milne*, 8 Peters, 120, Chief Justice MARSHALL announced the following rule:

"The practice of this Court is, not (except in cases of absolute necessity) to deliver any judgment in cases where constitutional questions are involved, unless four judges concur in the opinion, thus making the decision that of a majority of the whole Court. In the present case four judges do not concur in opinion as to the constitutional questions which have been argued. The Court therefore direct these cases to be reargued at the next term, under the expectation that a larger number of the judges may then be present."

The same cases were again called, at the next term of the Court, and the Chief Justice said:

"The Court cannot know whether there will be a full Court during the term; but as the Court is now composed, the constitutional cases will not be taken up." (9 Peters, 85.)

The rule laid down by Chief Justice MARSHALL has been followed and applied. Thus, in *Home Insurance Co. v. New York*, 119 U. S. 129, 148, Chief Justice WAITE announced that the judgment of the Supreme Court of the State of New York was affirmed by a divided Court. At that time, Mr. Justice Woods was ill and absent during the whole of the term, and took no part in any of the cases argued at that term. There were, therefore, only eight members of the Court. A petition for a reargument was presented upon the ground that the principle announced by Chief Justice MARSHALL should be followed, and that the constitutional question involved was sufficiently important to demand a decision concurred in by a majority of the whole Court. This petition was granted. (122 U. S. 636.) In the meantime, Mr. Justice Woods had died. The case was not reargued until after the appointment of Mr. Justice LAMAR, and resulted in the affirmance of the judgment below in an opinion by Mr. Justice FIELD, in which six Justices concurred—Mr. Justice MILLER and Mr. Justice HARLAN dissenting. (134 U. S. 594, 597.)

Wherefore, appellants pray that the foregoing application be granted.

WILLIAM D. GUTHRIE,
B. P. WAGGENER, AND
ALBERT H. HORTON,
Of Counsel for Appellants.

We accept service of the foregoing motion, and also of notice that the same will be presented for hearing to the Court on Monday, October 9th, 1899, at twelve o'clock M., or as soon thereafter as counsel can be heard; and we also consent to the postponement of the hearing of the above appeal in this Court, on account of the constitutional questions involved, to some later day during the term at which a full Court shall be present.

A. A. GODARD,
Attorney-General of the State of Kansas.

WALLACE PRATT,
Counsel for other Defendants.

TOPEKA, KANSAS,
October 3, 1899.